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INTRODUCTION

The Petitioner, Mario Bustillo, is a citizen of Honduras and a convicted murderer. Following his arrest, the police did not inform him that he had an opportunity to contact the Honduran Consulate. Although this claim was never raised at trial, Bustillo argues that this failure to inform him of his opportunity to contact the consulate entitles him to habeas relief. The Supreme Court of Virginia – relying on a long-established adequate and independent state ground – denied relief. Although this Court limited the grant of certiorari to a single question presented, that question actually involves two distinct issues:

1. Does the *Vienna Convention on Consular Relations*, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("*VCCR*"), create judicially enforceable individual rights?
2. If so, does the *VCCR* require state courts to ignore state law?

The first issue – whether the *VCCR* creates judicially enforceable individual rights – is a straightforward question of treaty interpretation. Virtually all American appellate courts to address the issue have concluded that the *VCCR does not* create judicially enforceable individual rights.[1] *See Cardenas v. Dretke*, 405 F.3d 244, 253 (5th Cir. 2005); *United States v. Emuegbunam*, 268 F.3d 377, 394 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d 192,

[1] Of course, some federal trial courts have reached the opposite conclusion. *See United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 979 (N.D. Ill. 2002); *United States v. Hongla-Yamache*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States v. Superville*, 40 F. Supp. 2d 672, 678 (D.V.I. 1999).

195-98 (5th Cir. 2001); *United States v. Li*, 206 F.3d 56, 67 (1st Cir. 2000) (*en banc*); *Gomez v. Kentucky*, 152 S.W.3d 238, 242 (Ky. App. 2004); *New Mexico v. Martinez-Rodriguez*, 33 P.3d 267, 274 (N.M. 2001); *North Carolina v. Aquino*, 560 S.E.2d 552, 556 (N.C. App. 2001); *Oregon v. Sanchez-Llamas*, 108 P.3d 573, 578 (Or.), *cert. granted*, 126 S. Ct. 620 (2005); *Cauthern v. Tennessee*, 145 S.W.3d 571, 626 (Tenn. App. 2004); *Shackleford v. Virginia*, 547 S.E.2d 899, 905 (Va. 2001); *Wisconsin v. Navarro*, 659 N.W.2d 487, 494 (Wis. App. 2003). *But see Jogi v. Voges*, 425 F.3d 367, 382 (7th Cir. 2005). Similarly, appellate courts in the Australian States and Canadian Provinces have determined that the *VCCR does not* create judicially enforceable individual rights. *See R. v. Abbrederis*, (1981) 51 F.L.R. 99, 115 (N.S.W.) (*VCCR* deals "with freedom of communication between consuls and their nationals. It says nothing touching upon the ordinary process of an investigation by way of interrogation."); *R. v. Partak*, [2001] 160 C.C.C. (3d) 533, 570 (Ont.) ("[T]he Vienna Convention appears to deal with obligations between states as opposed to obligations owed to nationals."); *R. v. Van Bergen*, [2000] 261 A.R. 387, ¶ 15 (Alta.) ("The Vienna Convention creates an obligation between states and is not one owed to [an individual]."). However, the International Court of Justice has concluded that the *VCCR* does create judicially enforceable individual rights – at least in context where there is a possibility that a foreign national faces a "severe" criminal penalty such as a capital case.[2] *See Avena and Other Mexican Nationals*

[2] In the United States, decisions of the International Court of Justice regarding the *VCCR* are, at best, persuasive authority. *Cf.* S. Afr. Const. § 39(1)(b) (When interpreting the South African Bill of Rights, courts must consider international law.). Under our Constitution, the ultimate authority to adjudicate the meaning of federal law – including treaties –

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(Mexico v. United States), 2004 I.C.J. 12, ¶ 151 (Mar. 31); *LaGrand (Federal Republic of Germany v. United States)*, 2001 I.C.J. 466, ¶ 77 (June 27).

The second issue – whether the *VCCR* requires state courts to ignore state law – is "about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). Exercising its sovereign powers, Virginia has determined both the substantive scope and the procedure for obtaining a writ of habeas corpus in its own courts. *See Virginia Code* § 8.01-654 (establishing the writ of habeas corpus). Because the *VCCR* claim could have been raised at trial and was not, Virginia law prohibits the Virginia courts from considering the claim in a habeas corpus proceeding. *See Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974). "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," *Coleman*, 501 U.S. at 729. *See also Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257, 263 (1872). Thus, under this Court's well established precedents, habeas corpus relief is unavailable. *See Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977). *See also Ulster County Court v. Allen*, 442 U.S. 140, 148 (1979). Indeed, state laws – including state procedural default rules – govern a state court's implementation of the *VCCR*. *Breard v. Greene*, 523 U.S. 371, 375 (1998) (*per curiam*).[3]

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rests with this Court. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). *See also Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

[3] Moreover, "neither the text nor the history of the [*VCCR*] clearly provides a foreign nation a private right of action in United States' courts to

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In order for Bustillo to prevail on both issues, this Court must (1) ignore the plain language of the *VCCR*, its treaty preparation materials, and its consistent application by the many signatory nations over more than thirty years; (2) contravene the interpretation of the Executive Branch on an issue of foreign relations; (3) overrule *Breard;* (4) transgress the principles of *Teague v. Lane*, 489 U.S. 288, 306-07 (1989); (5) violate the States' sovereignty; and (6) exalt the application of a treaty over the Constitution.

STATEMENT OF THE CASE

1. Bustillo's Crime

On the evening of December 10, 1997, at about 7:30 p.m., James Merry and three friends, Jesse Konstanty, Michelle Gutierrez, and Valeria Landaeta were eating dinner inside a Popeye's restaurant in Springfield, Virginia. Tr. 3/17/98 at 100, 125, 127.[4] Ms. Gutierrez looked out into the parking lot and saw three cars parking. The cars' occupants started pointing at the group. Ms. Gutierrez warned her friends not to leave the restaurant because she thought something was going to happen. Tr. 03/17/98 at 127. Ms. Gutierrez knew these men were members of the Commerce Street Locos, a gang. Tr. 03/17/98 at 148.

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set aside a criminal conviction and sentence for violation of consular notification provisions." *Breard*, 523 U.S. at 377. *See also Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (*per curiam*) (Sovereign immunity of the National Government bars suit by foreign nation to enforce *VCCR*.); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-30 (1934) (Sovereign immunity bars suit by foreign nation against a State.).

[4] Throughout this brief, references to the trial transcript are designated as "Tr. (date of trial) at ___." Although the trial transcript is not part of the Joint Appendix, these transcript citations may assist this Court in understanding the factual background.

Shortly thereafter, the men, around fifteen of them, entered the restaurant. Ms. Gutierrez recognized many of these men, including Bustillo, and an individual known to her as "Sirena." Tr. 03/17/98 at 129-30. She believed the men were drunk because their speech was slurred. They threatened Mr. Merry and Mr. Konstanty in Spanish, accusing them of fighting with members of their gang on another occasion. Ms. Gutierrez said they were mistaken, that neither Mr. Merry nor Mr. Konstanty was Hispanic or understood anything they were saying. The group insisted, "[n]o . . . it was him, it was him in the red car." Tr. 03/17/98 at 128. She insisted that they were mistaken because "he drives a blue car." The group looked at each other, after which Bustillo shook Mr. Merry's hand, and said, in Spanish, "Oh. I'm sorry. We got you mistaken." Tr. 03/17/98 at 129. One of them said "We have no problems with you. It's your friend that we want to get an opportunity to meet." Tr. 03/17/98 at 221. They left, and Ms. Gutierrez, who was still nervous, warned her friends to stay in the restaurant. Tr. 03/17/98 at 130. Nevertheless, Mr. Merry went outside to smoke a cigarette. Meanwhile, the gang members were walking around the parking lot. Ms. Gutierrez then saw Mr. Merry lean against a sign and light a cigarette. He appeared to be talking to Cristina Hondoy, who was facing him. Bustillo ran up, swung a baseball bat, hit Mr. Merry on the left side of his head, and ran away. Tr. 03/17/98 at 131, 181. Because of this attack, Mr. Merry died.[5]

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[5] The blow fractured Mr. Merry's skull in several places. Tr. 03/17/98 at 205. Dr. Frances Field, the medical examiner who examined Mr. Merry's body, testified that such an injury would cause blood to "seep" into the inner ear and then out of the ear canal. Tr. 03/17/98 at 193. Following the attack, Mr. Merry's brain continued to swell,

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The police arrived soon after the attack and questioned a number of individuals. That night police recovered two baseball bats at the scene, fifty to seventy-five yards east of the Popeye's restaurant. Tr. 03/17/98 at 116. Neither bat had blood on it. Tr. 03/17/98 at 108. Mr. Bustillo was the only perpetrator identified to the police. Tr. 03/17/98 at 53, 67-69. The police subsequently arrested Bustillo and charged him with the murder of Mr. Merry. Although Bustillo is a citizen of Honduras, the police failed to advise him that he could contact Honduran consular officials.

2. Bustillo's Trial

a. Virginia's Case Against Bustillo

Bustillo, with the assistance of retained counsel, was tried for the murder on March 17-20, 1998. At his jury trial, Mr. Konstanty, Ms. Gutierrez, and Ms. Landaeta testified that Bustillo was the assailant.[6] Tr. 03/17/98 at 131, 138. Prior to trial, Ms. Gutierrez and Mr. Konstanty, separately and without hesitation, selected the petitioner's photograph from a spread Detective Richard Cline showed them. Tr. 03/18/98 at 39, 41-42; Tr. 03/18/98 at 21-22, 28. Ms. Landaeta went to the same school as Bustillo, where she would see him every day because she shared a class with him. Tr. 03/18/98 at 20-21. She also knew that Bustillo lived approximately

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shutting down his other organs, and he eventually died after life supports were discontinued. Tr. 03/17/98 at 207.

[6] Moreover, a member of Bustillo's gang, Nicolas Parada, told the police he had seen Bustillo strike Mr. Merry with the bat. Tr. 03/17/98 at 265; Tr. 03/18/98 at 51-52. At trial, however, he provided a different version, saying he saw the "kid had fallen down and . . . that Jesse [Konstanty] was chasing Mario [Bustillo] and Julio Sirena." Tr. 03/17/98 at 263. He could no longer recall whether Bustillo had a bat. Tr. 03/17/98 at 264.

five minutes from the Popeye's restaurant, and she, Ms. Gutierrez, and another friend showed the police where Bustillo lived. Tr. 03/18/98 at 22-23, 43, 67.

b. Bustillo's Defense

Bustillo claimed that a gang member nicknamed Sirena was responsible for the attack. Amilcar Amaya, who had been a member of Bustillo's gang, said he observed "Señor Julio," a/k/a Sirena, walk towards the area where Mr. Merry was standing. Tr. 03/18/98 at 90, 98-99. According to Mr. Amaya, when Sirena was close, he moved to the right, took out a bat, and hit Mr. Merry on the side of the head. Tr. 03/18/98 at 100, 110. Mr. Amaya testified that he did not see Bustillo there that evening at all, either inside or outside the restaurant, and stated that he was the one who shook hands with Mr. Merry inside the restaurant. At the time of trial, police did not know Sirena's identity. Tr. 03/18/98 at 70. He was referred to by one witness as having a first name "Julio." No one could provide the police with a last name or any information about Sirena. Tr. 03/18/98 at 70.[7] Moreover, although several individuals had a clear view of the incident, not a *single* eyewitness told the police that Sirena was the one who struck the fatal blow. Tr. 03/18/98 at 53, 67-68, 69. The jury found Bustillo guilty of the murder of Mr. Merry.

3. The Appeals

After several post-trial motions were denied, Bustillo then appealed his conviction with the assistance of retained

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[7] Sirena is referred to variously as Julio Sorto; Ostorto, Julio; Osorto, Julio C.; and Julio Cesar Osorto Herrera. Tr. 03/18/98 at 70; J.A. at 67.

counsel. Virginia's intermediate appellate court, the Court of Appeals, affirmed. *See Bustillo v. Virginia*, 2000 WL 365930 (Va. App. 2000) (unpublished). The Supreme Court of Virginia affirmed the decision without comment. *See Bustillo v. Virginia*, No. 001110 (Va. 2000) (unpublished). This Court also declined to review the decision. *See Bustillo v. Virginia, cert. denied,* 532 U.S. 1072 (2001).

4. State Habeas Corpus Petition

Bustillo, again with the assistance of retained counsel, filed a petition for a writ of habeas corpus in the state trial court alleging, among other things, that his *VCCR* rights were violated.[8] On May 3, 2002, Bustillo filed an "addendum" seeking to "augment" his habeas petition. He alleged that the *VCCR* obligation was "absolute and nondelegable" but argued, in the alternative, that his retained counsel was ineffective for failing to advise Bustillo of his right to consult with the Honduran consulate. He later filed a motion for leave to amend his petition on this ground. The Director objected on the ground that this amendment did not "relate back" to the original claims and was barred by the statute of limitations. *Virginia Code* § 8.01-654(A)(2).

On August 8, 2002, the trial court dismissed the *VCCR* claim based on *Slayton*, holding that Bustillo "had ample time to raise the issue at trial or on appeal." J.A. at 129.[9]

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[8] Bustillo also contended that his attorney was ineffective in a number of particulars and the prosecution and police had engaged in numerous acts of misconduct. State courts found these claims were without merit and they are not at issue in this Court.

[9] The order did not address the "addendum" or requested amendment seeking to raise a claim of ineffective assistance of counsel for

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5. Appeal of the Denial of the State Habeas Petition

Bustillo petitioned the Supreme Court of Virginia to hear his appeal of the denial of the habeas petition. J.A. at 170. The Supreme Court of Virginia denied the Petition and observed that "there is no reversible error in the judgment complained of. . . ." J.A. at 241.

6. The Petition for a Writ of Certiorari

Bustillo then asked this Court to review various aspects of the decision of the Supreme Court of Virginia. This Court granted certiorari, but limited the issues to the first question presented. *See Bustillo v. Johnson, cert. granted,* 126 S. Ct. 621 (2005). J.A. at 243. This Court also consolidated this matter with Number 04-10566.

SUMMARY OF ARGUMENT

The *VCCR* does not create judicially enforceable individual rights. First, as the text, the Executive Branch's interpretation, the ratification history, and the interpretations

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failing to inform Bustillo of his *VCCR* rights. The Director filed a motion for clarification, with an affidavit from trial counsel, asking the court to rule on this claim. Bustillo's trial counsel explained in his affidavit that he was the son of a diplomat and was aware of the *VCCR*. He deliberately did not advise his client of the *VCCR* because he did not want his client to speak to anyone for fear that these conversations might then be used against him at trial. The trial court entered an order amending the memorandum opinion on October 11, 2002, holding that the requested amendment was barred by the statute of limitations and, furthermore, had no merit under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). J.A. at 132-33. Bustillo never raised the issue on appeal. J.A. at 184-85.

of foreign nations all demonstrate, the *VCCR* does not create individual rights. Second, even if it does create individual rights, those rights are not judicially enforceable.

If the *VCCR* creates judicially enforceable individual rights, then the *VCCR* does not require state courts to ignore state law – their rules of procedural default. First, because Bustillo cannot obtain habeas relief, this Court need not address the issue of whether state courts are required to ignore state law. Second, if the issue is addressed, then the *VCCR* does not require state courts to ignore state law. Third, any interpretation of the *VCCR* that requires state courts to ignore, indeed refashion, state law raises grave constitutional concerns. The doctrine of constitutional doubt requires rejection of such an interpretation.

ARGUMENT

I. THE *VCCR* DOES NOT CREATE JUDICIALLY ENFORCEABLE INDIVIDUAL RIGHTS.

A. The *VCCR* Does Not Create Individual Rights.

1. The Text of the *VCCR* Does Not Create Individual Rights.

This Court has established certain principles of treaty interpretation. First, "treaties are construed more liberally than private agreements, and to ascertain their meaning [this Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). "In construing a treaty, as in construing a statute, [this Court

will] first look to its terms to determine its meaning."[10] *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). *See also Air France v. Saks*, 470 U.S. 392, 396-97 (1985) ("[T]he analysis must begin, however, with the text of the treaty and the context in which the written words are used."). The preamble to the treaty forms an integral part of a treaty's textual analysis.[11] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (relying on preamble to interpret treaty). Moreover, the Vienna Convention on the Law of Treaties provides that the preamble is an integral part of a treaty. *See Vienna Convention on the Law of Treaties, supra*, 1155 U.N.T.S. 331.[12] *See also Restatement (Third) of the Foreign Relations Law of the United States* pt. III Intro. Note (Vienna Convention on Treaties constitutes a codification of existing customary international law on the point.).

Second, "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. . . ." *Restatement, supra*, at § 907, cmt. A (1987). "One of the key characteristics of international law

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[10] Article 31 of the Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." *Vienna Convention on the Law of Treaties*, art. 31, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 340.

[11] Indeed, the preamble to a treaty is negotiated language that generally sets forth the purpose of the contracting parties in choosing particular words to implement specific obligations. *See United States v. John*, 437 U.S. 634, 654 n.8 (1978) (preamble signed by Choctaw Nation stricken from treaty as ratified by the United States Senate).

[12] The United States has not ratified the *Vienna Convention on the Law of Treaties*, but the Executive Branch has accepted it as "the authoritative guide to current treaty law and practice." S. Doc. Exec. L., 92nd Cong., 1st Sess. at 1 (1971).

is that it often features a notable lack of connection between rights and remedies. Unlike many modern legal systems, international law seems comfortable with the position that some of its norms may confer rights, the violation of which may well be irremediable." David J. Bederman, *The Spirit of International Law* 192 (2002). "Orthodox international law doctrine has regarded states as the primary, or even sole, actors in international law – the only entities that scholars considered to enjoy full 'international legal personality,' meaning that they could create and be the direct subject of international legal obligations." Jeffrey L. Dunoff, Steven R. Ratner, & David Wippman, *International Law, Norms, Actors, Process* 105 (2002). *See Frelinghusen v. Key*, 110 U.S. 63, 71 (1884) ("No nation treats with a citizen of another nation except through his government."); *Head Money Cases*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations."). *Cf. Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established."). Government officials responsible for negotiating treaties do so with these well established principles in mind. As this Court noted in a different context, "[w]e presume that Congress understands the legal terrain in which it operates, *see Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979), and we therefore expect Congress to state clearly any intent to reshape that terrain." *United States v. Texas*, 507 U.S. 529, 540-41 (1993). Finally, to the extent there is ambiguity in the treaty language regarding the creation of judicially enforceable rights, the ambiguity is resolved by the customary

presumption against the creation of treaty-based individual rights.[13]

Applying these principles of treaty interpretation, the *VCCR* does not create individual rights. First, the preamble to the *VCCR* plainly states that its purpose "is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." *VCCR, supra,* at 79. The text of the *VCCR*, through its preamble, thus explicitly disclaims any intent to benefit individuals.[14] Of course, Bustillo contends that

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[13] *See Emuegbunam*, 268 F.3d at 389 ("In fact, courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them."); *Li*, 206 F.3d at 67 (Seyla, J., joined by Boudin, J., concurring) ("Ambiguity brings into play the background presumption in respect to treaties between States – a presumption which holds that they do not create rights that private parties may enforce in court."); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable."). *Cf. Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990) ("It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved.").

[14] Indeed, in its decisions, the International Court of Justice has consistently relied on the language of the preambles in interpreting treaties. *See Case Concerning Sovereignty Over Certain Frontier Land (Belgium v. Netherlands)*, 1959 I.C.J. 209, 221-22 (June 20) (relying on preamble of a Boundary Convention as embodying "the common intention of the two states"); *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, 2002 I.C.J. 625, 652-53 (Dec. 17) (excluding, in boundary dispute, an interpretation of one of the provisions in a controlling Convention given the object and purpose stated by the preamble to the Convention); *Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 196 (Aug. 27) (after examining preamble, Court states it "can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects."); *Asylum Case (Columbia v. Peru)*, 1950 I.C.J. 266, 282 (Nov. 20) (relying on the preamble to interpret Article 2 of the Havana Convention). However, the clear preamble of the *VCCR* inexplicably escaped the

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the preamble was meant just to clarify the fact that the *VCCR* does not benefit consular officials in their individual capacity, but rather protects them in their official capacity. *Bustillo Br.* at 32-33. However, that is not what the preamble says – it plainly disclaims any intent to benefit *individuals,* not merely consular officials. Furthermore, the preamble provides that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." *Id.* Judicial enforcement of consular notification was unheard of before *LaGrand.*

Second, the introductory sentence of Article 36 of the *VCCR* specifies the provisions of that section were drafted "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending state," not with a view to create any individual rights that can be judicially enforced. This Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France,* 470 U.S. at 399. The text of Article 36 shows that the parties to the *VCCR* did not draft that section to protect criminal defendants.

Third, while Article 36 of the *VCCR* discusses a "right" of access to consular officials, this reference merely reflects the creation of *rights among the signatory nations.* Just as the consular official exercises the rights created by the *VCCR,* so does the individual. The signatory nation can seek redress for any violation of the rights created under the *VCCR,* both for its citizens and for its consular officials. The

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notice of the International Court of Justice when it examined a case involving inmates sentenced to death in the United States. *See Avena,* 2004 I.C.J. at ¶ 50; *LaGrand,* 2001 I.C.J. at ¶ 77.

right to communicate with a consul is a means of implementing the treaty obligation as between the signatory nations. Indeed, any other way of phrasing the burdens placed on the signatory nations would be both artificial and awkward. *See Li*, 206 F.3d at 67-68 (Seyla, J., joined by Boudin, J., concurring).

Fourth, the Director's interpretation of the term "rights" is consistent with other "rights" mentioned elsewhere in the treaty.[15] Article 36, paragraph 2, of the *VCCR* provides that

> The *rights* referred to in *paragraph 1* of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

VCCR, supra, at art. 36, ¶ 2 (emphasis added). Paragraph 1(b), provides that "authorities shall inform the person concerned without delay of his rights . . . " and paragraph 1(c) specifies that "consular officers shall have the right to visit a national of the sending State. . . ." *Id.* at art. 36, ¶ 1(b) and 1(c). Assuming the word "rights" does not change its meaning within the same article of the same treaty, Bustillo's contention that the word "rights" creates a judicially cognizable cause of action would signify that individuals as well as foreign nations must be permitted to litigate their "rights" in state and federal courts. This

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[15] For example, Article 9 of the *VCCR* mentions the "right" to designate consular officers other than the head of the consular post. Article 22 discusses the "right" to appoint citizens of another state as consular officers. Article 29 provides a "right" to display the national flag and the coat of arms.

would constitute an extraordinary departure from past practice.[16] *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) ("an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States" does not waive the sovereign immunity of a foreign nation.).

2. The Executive Branch Has Never Viewed the *VCCR* As Creating Individual Rights.

The Constitution chiefly confers the conduct of foreign affairs to the President. *See* U.S. Const. art. II, § 2 cl. 1 & 2; U.S. Const. art. II, § 3. Consequently, "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *El Al Israel Airlines*, 525 U.S. at 168. *See also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation

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[16] Moreover, Bustillo's argument ignores the paradoxical and highly undesirable consequences that naturally follow a conclusion that the *VCCR* creates judicially enforceable individual rights. There is no reason that the burdens imposed by the vindication of this purported individual right should rest exclusively with a host government. If the right of consultation with a consulate truly belongs to the individual, an American court could, at the behest of a detained foreign national, order a foreign nation to assist him. Thus, a Mexican citizen could obtain a court order from a state or federal court compelling a Mexican consulate to assist him. Similarly, a United States citizen detained overseas could invoke such an individual right of consular assistance and hail the United States into a foreign court for failing to assist him. Indeed, the family of a Canadian citizen actually is currently litigating whether Canada is obligated to provide such assistance. *See Khadr v. Canada (Minister of Foreign Affairs)*, [2004] 123 C.R.R. (2d) 7, 23 (Fed. Ct.) (remanding for further proceedings).

and enforcement is entitled to great weight."); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (same).

The Executive Branch has *never* construed the *VCCR* as creating a right vested in an individual. To the contrary, the State Department has consistently opined that the "right of an individual to communicate with his consular official is derivative of the sending state's right to extend consular protection to its nationals. . . ." *Li*, 206 F.3d at 67-68 (quoting U.S. State Dep't, *Answers to the Questions Posted by First Circuit* (2000)). Similarly, in 1970, the Executive Branch advised the States' Governors that it did "not believe that the Vienna Convention will require significant departures from the existing practice within the several states of the United States." *See Li*, 206 F.3d at 64 (quoting letter).[17]

For this Court to repudiate the Executive Branch's consistent interpretation of the *VCCR* would create a risk of conflict between the Executive Branch and this Court. In addition, the prospect of judicial repudiation of the Executive Branch's interpretation of treaties would likely deter the United States from entering into other beneficial conventions. *See* Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 Va. L. Rev. 1475, 1480-82 (2001).

3. The Ratification History Indicates That the *VCCR* Does Not Create Individual Rights.

The ratification history indicates that the *VCCR* does not create individual rights. The Executive Branch submitted

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[17] *Statement Before the Senate Committee on Foreign Relations*, S. Exec. Rep. No. 91-9, 91st Cong. at 5 (May 8, 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Dep't of State).

written testimony to the Senate stating that the "Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions," except with respect to a warrant requirement not relevant here. Appendix, S. Doc. Exec. E, 91st Cong., 1st Sess. (1969). Furthermore, the Chairman of the Senate Committee on Foreign Relations issued a report recommending ratification of the *VCCR* to the Senate. This report highlighted the *VCCR's* preamble and listed five factors that assisted the Committee in approving the treaty. The first of those factors was the Committee's belief that "the Convention does not change or affect present U.S. laws or practice." S. Doc. Exec. E, 91st Cong., 1st Sess. (1969). Manifestly, the Senate did not intend to create any individual rights.

4. Other Nations Have Not Interpreted the *VCCR* as Creating Individual Rights.

"The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart,* 489 U.S. 353, 369 (1989). *See also Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 260 (1984) (the conduct of the signatory nations "in implementing that [treaty], in the first 50 years of its operation cannot be ignored."). If the *VCCR* creates individual rights that are judicially enforceable, one would expect that numerous foreign courts would have reached that conclusion.

Despite the fact that the *VCCR* has been in effect for more than thirty-five years and has been adopted by over 160 nations, there is a striking lack of judicial decisions holding that the Treaty creates individual rights. Indeed,

appellate decisions from signatory nations reach the opposite conclusion. *See Abbrederis*, 51 F.L.R. at 116; *Partak*, 160 C.C.C. (3d) at 570; *Van Bergen*, 261 A.R. at ¶ 15. The practice of other nations illustrates that the *VCCR* does not create judicially enforceable individual rights.

B. Even if the *VCCR* Does Create Individual Rights, Those Rights Are Not Judicially Enforceable.

Even if the *VCCR* does create individual rights, those rights are not judicially enforceable. First, the Treaty's text does not provide for judicial enforcement.[18] Second, the fact that the *VCCR* is "self-executing" does not mean that it can be judicially enforced. Third, a foreign national has other remedies for violations of the *VCCR*.

1. The *VCCR*'s Text Does Not Provide for Judicial Enforcement.

If the signatory nations to the *VCCR* wished to displace national or local law, then they would have done so in explicit terms.[19] Indeed, recognizing that law regarding intestacy is

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[18] Similarly, the mere fact that a statute or regulation confers a benefit on an individual does not mean that the individual can enforce that statute or regulation in federal court. *See Gonzaga University v. Doe*, 536 U.S. 273, 285-89 (2002) (Family Educational Rights and Privacy Act may not be enforced by private parties); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (certain Title VI implementing regulations cannot be enforced by private parties).

[19] Indeed, as this Court has recognized, where a treaty provides for judicial enforcement, Congress frequently enacts legislation to facilitate the private enforcement of individual rights under a treaty. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 461-62 (1899) (claim derived from Convention Between Mexico and the United States of 1868 subject to judicial consideration only pursuant to 1892 statute);

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left to the American States, this Court observed, "treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms." *Rocca v. Thompson*, 223 U.S. 317, 332 (1912). For example, the *Hague Convention on the Civil Aspects of International Child Abduction*, art. 7, Oct. 25, 1980, T.I.A.S. 11,670, 1343 U.N.T.S. 98, explicitly provides for judicial or administrative proceedings.[20] Similarly, the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Mar. 7, 1966, U.S. Dep't of State, *Treaties in Force* 413 (Jan. 2005), 660 U.N.T.S. 195 (entered into force for the United States, Nov. 20, 1994), provides that signatory nations engage themselves to provide "effective protection and remedies, through the competent national tribunals and other State institutions," *id.* at art. 6, and that signatory nations "may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention." *Id.* at art. 14. A

United States v. Blaine, 139 U.S. 306, 323 (1891) (same Convention: "The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it."); *United States v. Weld*, 127 U.S. 51, 56-57 (1888); *Alling v. United States*, 114 U.S. 562 (1885); *Great Western Ins. Co. v. United States*, 112 U.S. 193, 200 (1884); *Frelinghuysen*, 110 U.S. at 74.

[20] For the implementing legislation, *see The International Child Abduction Remedies Act*, 42 U.S.C. §§ 11601-11610.

nineteenth-century extradition treaty between the United States and the United Kingdom provided in relevant part that "the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged" and that "the examining judge or magistrate" was required "to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive." *United States v. Rauscher*, 119 U.S. 407, 411 (1896).

The text of the *VCCR* does not provide for any domestic judicial remedy.[21] Instead, the United States ratified the *Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes*, opened for signature Apr. 24, 1963; 21 U.S.T. 325, 596 U.N.T.S. 487 (entered into force for signatory nations Mar. 19, 1967; for the United States, Dec. 24, 1969; United States withdraws, Mar. 7, 2005). The *Optional Protocol* provides in the unambiguous language of its preamble that the parties "[e]xpress[] their wish to resort in *all matters* concerning them in respect of *any dispute arising out of the interpretation or application* of the Convention to the compulsory jurisdiction of the International Court of Justice. . . ." *Id.* (emphasis added).[22]

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[21] It is not surprising that the United States sought no domestic judicial enforcement of the *VCCR* given the hollow nature of such a remedy in many of the world's courts. These courts would have included, at the time, the U.S.S.R. and its satellites, nations whose judiciaries did not distinguish themselves by their impartiality and independence. Problems of corruption, judicial independence, and lack of access to courts continue to plague many of the world's judiciaries. *See* Human Rights Watch, *World Report 2005* (2005).

[22] The International Court of Justice cannot entertain private lawsuits; its constituting statute restricts the court to resolving

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Moreover, while many delegates to the negotiating sessions complained about the heavy burden *notification* would place upon their nation, not a single delegate raised any complaint about any judicial enforcement mechanism purportedly created by the *VCCR*. Official Records, *United Nations Conference on Consular Relations,* Vienna, Mar. 4-Apr. 22, 1963, U.N. Doc. A/Conf. 25/16 (1963) 36 (statement of the representative of the United Arab Republic) 52 (statement of the representative of Tunisia) 336-37 (statement of the representative of Thailand). Given the wide divergence in the legal systems of the many signatory nations, the absence of any discussion concerning the modalities of its domestic judicial implementation is telling.

Finally, if this Court were to hold that the mere mention of the word *rights* in a treaty is sufficient to confer judicial redress, such a holding would usher in a new era of treaty-based litigation. For example, the *Geneva Convention Relative to the Treatment of Prisoners of War*, Art. 28, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, provides that a representative of the prisoners has a "right" to participate in the management of a canteen fund. If this individual is displeased with the United States military's management of the canteen and the canteen fund, the representative could initiate a legal action to seek judicial redress.

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disputes between nation states. *See Statute of the International Court of Justice*, art. 34(1), opened for signature June 26, 1945, 59 Stat. 1031, T.S. 993. Had the drafters of the *VCCR* intended to create a judicial remedy for the violations of its terms, they could have readily accomplished this purpose.

2. The Fact that the *VCCR* Is "Self-Executing" Does Not Mean That It Can Be Judicially Enforced.

The fact that the *VCCR* is described as "self-executing" does not alter the previous analysis. The term "self-executing" is often erroneously conflated with the distinct concept of invocability, which is akin to the domestic law concept of standing. "Whether a treaty is self-executing is not to be confused with whether the treaty creates private rights or remedies." *Restatement, supra*, at § 131 cmt. h (1987). *See also* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis,* 86 Am. J. Int'l L. 310, 317-18 (1992). A self-executing treaty is one that takes effect upon ratification and requires no separate implementing statute. *See Restatement, supra*, at § 111(4). Invocability, on the other hand, refers to the person or entity that is "entitled to invoke or rely on the treaty norms." Jackson, *supra*, at 317-18. *See also Li*, 206 F.3d at 67-68 (Seyla, J., joined by Boudin, J., concurring) ("Whether the terms of such treaty provide for private rights, enforceable in domestic courts, is a wholly separate question. The fact that the concepts are sometimes lumped together does not detract from their distinctiveness. At bottom, the questions remain separate. It follows inexorably that the self-executing character of a treaty does not by itself establish that the treaty creates private rights.").

3. A Foreign National Has Remedies for Violations of the *VCCR*.

The absence of judicial enforcement of the *VCCR* does not mean that the foreign national lacks a remedy. First, redress for any violations of the *VCCR* lies in accord with long-standing custom in the diplomatic or political arena.

Treaties have historically depended "on the interest and honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. at 598. "[I]nfraction becomes the subject of international negotiations and reclamations." *Id.* In such matters, "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id.*

Second, in addition to any redress through the customary diplomatic channels, nothing prevents a foreign national from raising, under the right facts, a claim of ineffective assistance of counsel for failing to obtain consular assistance.[23] Under our Constitution, all criminal defendants – regardless of nationality – are entitled to effective assistance of counsel. *See Strickland*, 466 U.S. at 686. An effective counsel representing a foreign national would at least recognize and consider the possibility of contacting the foreign national's consul as part of the pretrial preparation. *See Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) ("Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national.").

II. THE *VCCR* DOES NOT REQUIRE STATE COURTS TO IGNORE STATE LAW.

If this Court concludes that the *VCCR* creates judicially enforceable individual rights, then this Court will have to address the implications of that conclusion for

[23] Interestingly, Bustillo raised such a claim in the habeas proceedings in the trial court. However, after the trial court denied the claim, he failed to appeal it to the Supreme Court of Virginia.

state courts confronting habeas claims based on the Vienna Convention. Bustillo argues that the *VCCR* requires state courts to ignore state law – their rules of procedural default.

A. Because Bustillo Cannot Obtain Habeas Relief, This Court Need Not Address the Issue of Whether the *VCCR* Requires State Courts to Ignore State Law.

It is unnecessary for this Court to address Bustillo's assertion that the *VCCR* requires state courts to ignore state law. Quite simply, Bustillo, as a matter of law, cannot obtain habeas relief. First, because *VCCR* violations are not cognizable as habeas claims, Bustillo cannot obtain habeas relief. Second, even if *VCCR* violations were cognizable, Bustillo's claim for habeas relief would still be barred by *Teague*.

1. Violations of the *VCCR* Are Not Cognizable in Habeas Proceedings.

Although the *VCCR* has the force and effect of a federal statute, *see Whitney v. Robertson*, 124 U.S. 190, 194 (1888), not every violation of a federal statute provides grounds for habeas relief. *See Reed v. Farley*, 512 U.S. 339, 358 (1994). *See also Medellin v. Dretke*, 125 S. Ct. 2088, 2090 (2005) (stating that a claim for violation of the *VCCR* might not be cognizable in habeas proceedings). Indeed, a violation of federal statutory rights is not cognizable in habeas proceedings unless there is "a fundamental defect which inherently results in a complete miscarriage of

justice [or] an omission inconsistent with the rudimentary demands of fair procedure."[24] *Hill v. United States*, 368 U.S. 424, 428 (1962). *See also United States v. Timmreck*, 441 U.S. 780, 783 (1979); *Davis v. United States*, 417 U.S. 333, 346 (1974) (both applying the fundamental defect test). Moreover, the number of violations that qualify as a "fundamental defect" is limited. *Reed*, 512 U.S. at 357 (Scalia, J., joined by Thomas, J., concurring) ("The class of procedural rights that are *not* guaranteed by the Constitution (which includes the Due Process Clauses), but that nonetheless *are* inherently necessary to avoid 'a complete miscarriage of justice,' or numbered among 'the rudimentary demands of fair procedure,' is no doubt a small one, if it is indeed not a null set.").

Assuming that the *VCCR* confers individual rights that are judicially enforceable, the violation of those rights is not a "fundamental defect."[25] While foreign nationals might benefit from being advised of their ability to notify their consulate, the failure to inform them of their ability cannot be equated with a denial of the right against self-incrimination, the right to counsel, the right to a speedy trial, the right to be tried by a jury of one's peers, the right to cross-examine witnesses, or the right to appeal. Rather,

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[24] While the "fundamental defect" test was developed in the context of this Court's review of a federal court judgment, its reasoning is equally applicable to this Court's review of a state court judgment. The rationale for the "fundamental defect" test – that not every violation of federal law justifies habeas relief – is equally applicable to both federal and state proceedings.

[25] Indeed, the International Court of Justice, albeit *in dicta*, concluded that "neither the text nor the object and purpose of the Convention, nor any indication in the *travaux preparatoires*, support the conclusion that" the *VCCR* establishes "a fundamental human right that constitutes part of due process in criminal proceedings." *Avena*, 2004 I.C.J. at ¶ 124.

the failure to advise one of the ability to contact one's consulate can be equated to the failure to comply with the formal requirements of the Interstate Agreement on Detainers or the formal requirements for taking guilty pleas. *See Reed*, 512 U.S. at 346 (claim that trial court failed to comply with the formal requirements of the Interstate Agreement on Detainers is not cognizable in habeas corpus proceedings); *Timmreck*, 441 U.S. at 783 (Claim that trial court failed to comply with formal requirements for taking guilty pleas is not cognizable in habeas corpus proceedings).

Accordingly, *VCCR* violations are not cognizable in habeas corpus proceedings. Therefore, because Bustillo cannot obtain habeas relief, this Court need not address the issue of whether the *VCCR* requires state courts to ignore state law.

2. Habeas Relief Is Barred by The *Teague* Doctrine.

If the *VCCR* confers judicially enforceable individual rights and if claims based on those rights are cognizable in habeas proceedings, then the *Teague* doctrine bars Bustillo's claim for habeas relief.

Under *Teague*, if a state court denies habeas relief based on *federal* law and this Court later announces a "new rule" of federal law, federal courts will not overturn the original state court judgment.[26] *Teague*, 489 U.S. at

[26] Although *Teague* was developed in the context of this Court's review of a federal court judgment, its reasoning also applies to this Court's review of a state court judgment. The rationale for *Teague* – that convicted individuals should not be allowed to relitigate their convictions simply because this Court has announced a new rule – is equally applicable to this Court's review of both federal and state judgments.

306-07. In other words, if the state court correctly interpreted federal law at the time of its decision, that decision will be respected – even where this Court later changed or clarified the law. Because a state conviction becomes final when this Court denies certiorari, *see O'Dell v. Netherland*, 521 U.S. 151, 157 (1997), Bustillo's conviction became final when this Court denied certiorari on June 4, 2001. *See Bustillo*, 532 U.S. at 1072. Therefore, Bustillo can obtain habeas relief only if he can demonstrate that the rule he seeks to enforce – that *VCCR* creates judicially enforceable individual rights – existed prior to June 4, 2001.

As a matter of law, Bustillo cannot meet this burden. First, Bustillo unquestionably seeks both the announcement, and the benefit, of a "new rule." In *Breard*, a decision Bustillo asks this Court to overrule, the Court specifically relied on a state procedural default to dismiss a claim based on the *VCCR*. *See Breard*, 523 U.S. at 375. Second, even if *Avena* and *LaGrand* are somehow regarded as announcing a new rule binding on this Court and the lower courts, both of those decisions were rendered *after* Bustillo's conviction. *Avena* was decided more than two years after Bustillo's conviction became final – and more than six years after his trial. *LaGrand* was decided on June 27, 2001, just over three weeks after this Court denied certiorari. Third, neither exception to the holding in *Teague* applies to this case. The *VCCR* is not even arguably part of the "narrow class" of watershed rules of criminal procedure "implicit in the concept of ordered liberty." *Beard v. Banks*, 542 U.S. 406, 416-17 (2004) (citation omitted). Nor is the proposed new rule one that would forbid punishment "of certain primary conduct [or . . .] rules prohibiting a certain category of punishment for a class of defendants because of [their] status or offense." *Id. See also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)

(same). Accordingly, Bustillo cannot obtain habeas relief. Given that *Teague* bars habeas relief, there is no reason to inquire as to whether state courts are required to ignore state law.[27]

B. The *VCCR* Does Not Require State Courts to Ignore State Law.

If this Court concludes that it is necessary to address the issue of whether the *VCCR* Convention requires state courts to ignore state law, then this Court should conclude that the *VCCR* does not require state courts to ignore state law. This is so for three reasons. First, *Breard* holds that the *VCCR* does not require state courts to ignore state law. There is no reason to revisit that holding. Second, although the International Court of Justice has articulated a contrary view, its reasoning is fundamentally flawed. Third, the failure of a foreign national to raise the *VCCR* claim at trial does not justify requiring state courts to ignore state law.

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[27] Of course, this proposed course of decision represents a departure from this Court's usual practice. Generally, the issue of whether a habeas claim is procedurally defaulted is addressed before the issue of whether *Teague* bars the claim. *See Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). However, "there may be exceptions to the rule that the procedural bar issue should be resolved first. One case might be where the procedural bar question is excessively complicated, but the *Teague* issue can be easily resolved." *Id.* at 547 (O'Connor, J., dissenting). In this matter, the *Teague* issue is straightforward and easily resolved, but the procedural default issue involves complex questions of treaty interpretation and dual sovereignty. Accordingly, in this instance, this Court should decide the *Teague* issue first.

1. *Breard* Holds That the *VCCR* Does Not Require State Courts to Ignore State Law.

In *Breard*, this Court held that state law – including state procedural default rules – governs a state court's implementation of the *VCCR*. *Breard*, 523 U.S. at 375. This Court, applying an international law principle, concluded that the law of the forum State controls absent "a clear and express statement to the contrary." *Id.* The *VCCR* contains no such clear and express statement.[28] *Id.* Indeed, by providing that the rights "shall be exercised in conformity with the laws and regulations of the receiving State," the *VCCR* itself actually reinforces the background international law principle. *Id.* Moreover, "a treaty, like an Act of Congress, should not be construed to preempt state law unless its intent to do so is clear." *El Al Israel Airlines*, 525 U.S. at 181 (1999) (Stevens J., dissenting). The same principle applies with respect to federal statutes. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 351 (1994); *CSX Transp., Inc. v. Easterwood*,

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[28] The *VCCR* provides that the "laws and regulations [of the receiving State] must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *VCCR*, *supra*, art. 36(2). This statement is hardly "a clear and express statement" that dispenses with the presumption that "the procedural rules of the forum State govern the implementation of the treaty in that State." *Breard*, 523 U.S. at 375. Moreover, if the President and the Senate had intended for the Treaty to require state courts to ignore state law, they presumably would have made an explicit mention of such a provision. Yet, nothing in the text, ratification debate, or the *travaux preparatoires* of the Treaty supports the idea that the President, in negotiating and the Senate in ratifying the Treaty intended to make this extraordinary and unprecedented intrusion into a State's jurisprudence.

507 U.S. 658, 664 (1993); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Any intent of the *VCCR* to override state law is hardly clear. *Cf. Gonzales v. Oregon*, 126 S. Ct. ___, ___ (2006) (Congress did not have a "far reaching intent to alter the federal-state balance" and not did not authorize the National Attorney General "to effect a radical shift of authority from the States to the National Government to define general standards of medical practice in every locality."). In fact, the Senate, far from contemplating a radical, unprecedented intrusion on state law, relied on the representation of the Executive Branch that the *VCCR* did not change existing law. S. Doc. Exec. E., 91st Cong., 1st Sess. (1969).

In sum, *Breard* was correct when it was decided and remains correct today. *Stare decisis* recommends against revisiting *Breard*'s holding that the *VCCR* does not require state courts to ignore state law.

2. The Contrary Decisions of the International Court of Justice Are Fundamentally Flawed.

Of course, the International Court of Justice concluded that the *VCCR* requires state courts to ignore state law. *See Avena*, 2004 I.C.J. at ¶¶ 107-41; *LaGrand*, 2001 I.C.J. at ¶¶ 90-91. Specifically, the International Court of Justice interpreted the Full Effect Clause of the Treaty, *VCCR, supra*, art. 36(2) as requiring American state courts to ignore their own laws and consider *VCCR* claims that were otherwise procedurally barred.[29] *Avena*, 2004 I.C.J. at ¶¶ 132-34,

[29] The Full Effect Clause of the Treaty provides that laws of the forum state "must enable full effect to be given to the purposes for

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153(9); *LaGrand*, 2001 I.C.J. at ¶ 128(7). However, the International Court of Justice's reasoning is simply wrong.[30]

As a textual matter, Article 36(2) of the *VCCR* provides that the rights mentioned in the preceding section must be "*exercised* in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." *VCCR, supra*, art. 36(2) (emphasis added). The plain language of this provision refers to the "exercise" of the rights, not to an after the fact judicial redress for any violation of the terms of the *VCCR*.[31] In other words, a nation may not impose

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which the rights accorded under this Article are intended." *VCCR, supra*, art. 36(2).

[30] Although this Court has relied on decisions from the International Court of Justice as evidence of the norms of international law, *see United States v. Maine*, 475 U.S. 89, 99-100 (1986); *United States v. Louisiana*, 470 U.S. 93, 107 (1985), it has never declared itself bound by those decisions. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 n.27 (2004) (International Court of Justice decision did not establish a rule of law prohibiting arbitrary detentions.).

[31] The same "full effects" language appears in multilateral conventions relating to piracy, hostage taking, terrorism financing and terrorist bombings. It would be incongruous, to say the least, for the United States government to seek greater procedural protections for foreign nationals, terrorists and pirates, than for United States citizens. *See International Convention for the Suppression of the Financing of Terrorism*, opened for signature Dec. 9, 1999, U.S. Dep't of State, *Treaties in Force* 512 (Jan. 2005), 2178 U.N.T.S. 229 (1999) (entered into force for the United States July 26, 2002); *International Convention for the Suppression of Terrorist Bombings*, Art. 7(4), Dec. 15, 1997, U.S. Dep't of State, *Treaties In Force* 512 (Jan. 2005), 2149 U.N.T.S. 284 (1998) (entered into force for the United States July 26, 2002); *International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Art. 7(4), Mar. 10, 1988, U.S. Dep't of State, *Treaties in Force* 462 (Jan. 2005) 1678 U.N.T.S. 221 (1988)

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unreasonably restrictive visitation hours, detain foreign nationals in remote, inaccessible locales, or impose other measures that would restrict the "exercise" of the rights. The treaty preparation materials show this was the concern of the diplomatic delegations. *See* Official Record, *Conference on Consular Relations, supra,* at 40,347.

3. The Possibility That a Foreign National May Fail To Raise a *VCCR* Claim at Trial Does Not Justify Requiring State Courts to Ignore State Law.

The possibility that a foreign national may not raise a *VCCR* claim at trial and, thus, forfeit the right to raise it in collateral proceedings does not justify requiring state courts to ignore state law. Bustillo argues that a criminal defendant cannot be expected to raise the issue of his *VCCR* rights at trial because he will not be aware of them. *Bustillo Br.* at 35. However, few criminal defendants will be aware of the subtleties of the Fourth, Fifth, Sixth and Eighth Amendments, nor will they understand how to examine witnesses, conduct legal research, authenticate exhibits, or make motions. Expecting an effective counsel to recognize and consider raising a Treaty claim at trial is no different than expecting an effective counsel to recognize and consider raising a *constitutional* claim at trial. Put another way, there is no reason to exalt a *VCCR* claim over all other claims including constitutional claims.

(entered into force for the United States on March 6, 1995); *International Convention Against the Taking of Hostages*, Art. 6(4), Dec. 17, 1979, T.I.A.S. No. 11,081, 1316 U.N.T.S. 205 (1983). Moreover, a holding that this language creates individual rights and supersedes all defaults would place courts in the role of adjudicating sensitive foreign affairs issues.

Because the *VCCR* does not require state courts to ignore state law, Bustillo's habeas petition raising a Treaty claim is barred by Virginia law.[32]

C. Under the Doctrine of Constitutional Doubt, This Court Must Conclude That the *VCCR* Does Not Require State Courts to Ignore State Law.

As explained above, the *VCCR* does not require state courts to ignore state law. However, if this Court concludes that the *VCCR* is somehow ambiguous on the issue, then the doctrine of constitutional doubt compels this Court to conclude that state courts are not required to ignore state law.

1. The Doctrine of Constitutional Doubt Requires This Court to Reject an Interpretation That Raises Grave Constitutional Questions.

"The doctrine of constitutional doubt" requires this Court "to interpret statutes, if possible, in such fashion as

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[32] However, a foreign national whose Treaty claim is barred by state law theoretically could seek relief by seeking an "original" writ of habeas corpus in this Court. *See* Sup. Ct. R. 20.4. *See also Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) ("The [*Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. 104-132, 110 Stat. 1217 (1996)] does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."); *Id.* at 666. (Stevens, J., joined by Souter & Breyer, J.J., concurring) ("As the Court correctly concludes, the Act does not divest this Court of jurisdiction to grant petitioner relief by issuing a writ of habeas corpus.").

to avoid grave constitutional questions." *Federal Election Comm'n v. Akins,* 524 U.S. 11, 32 (1998). Thus, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" then this Court is "obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr,* 533 U.S. 289, 299-300 (2001). *See also Ashwander v. TVA,* 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring); *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 408 (1909). Since the interpretation urged by Bustillo – that the *VCCR* requires state courts to ignore state law – raises grave constitutional questions, this Court must reject that interpretation and accept an interpretation that avoids the difficult constitutional issues.

2. Any Interpretation of the *VCCR* That Requires State Courts to Ignore State Law Raises Grave Constitutional Questions.

A treaty may not violate the constitutional principles of dual sovereignty. However, requiring state courts to ignore state law would violate those principles.

a. A Treaty May Not Violate the Constitutional Principles of Dual Sovereignty.

The Constitution "split the atom of sovereignty" by "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits v. Thornton,* 514 U.S.

779, 838 (1995) (Kennedy, J., concurring).[33] By dividing sovereignty between the National Government and the States, the Constitution insured that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51* at 291 (James Madison).[34] *See also The Federalist No. 28* at 149 (Alexander Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.").[35] Thus, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the

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[33] Justice Kennedy's idea of dividing power between dual sovereigns rests on a solid historical foundation. As early as 1768, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* 1 Alfred H. Kelly, Winfred A. Harbison, & Herman Belz, *The American Constitution: Its Origins and Development* 46-49 (7th ed. 1991).

[34] Prior to the adoption of the Constitution, the thirteen States effectively were thirteen sovereign nations. *See Declaration of Independence* ("these United colonies are and of right ought to be free and independent states"). Each individual State retained the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Id.* Indeed, the Articles of Confederation explicitly recognized that each State "retains its sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled." *Articles of Confederation*, art. II. In sum, before the ratification of the United States Constitution, the States were sovereign entities. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

[35] Throughout this Brief, all page number citations to *The Federalist* are from *The Federalist Papers* (Clinton Rossiter, ed. 1961, Mentor Books Edition 1999).

National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868). This division of sovereignty between the States and the National Government "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002). It "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). The division of power between *dual sovereigns*, the States and the National Government, is reflected throughout the Constitution's text, *see Printz v. United States*, 521 U.S. 898, 919 (1997), as well as its structure. *See Alden v. Maine*, 527 U.S. 706, 714-15 (1999). *See also* U.S. Const. amend X. (If a sovereign power is not explicitly given to the National Government, the sovereign power is reserved to the States or to the People.) "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring), this Court has intervened to maintain the sovereign prerogatives

of both the States and the National Government.[36] In order to preserve the sovereignty of the National Government, this Court has prevented the States from imposing term limits on members of Congress, *U.S. Term Limits*, 514 U.S. at 800-01, and instructing members of Congress as to how to vote on certain issues, *Cook v. Gralike*, 531 U.S. 510, 519-22, (2001). Similarly, it has invalidated state laws that infringe on the right to travel, *Saenz v. Roe,* 526 U.S. 489 (1999), that undermine the Nation's foreign policy, *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372-74 (2000), and that exempt a State from generally applicable regulations of interstate commerce. *Reno v. Condon,* 528 U.S. 141, 150 (2000). Conversely, recognizing that "the erosion of state sovereignty is likely to occur a step at a time," *South Carolina v. Baker,* 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting), this Court has declared that the National Government may not compel the States to pass particular legislation, *New York,* 505 U.S. at 162, require state officials to enforce federal law, *Printz*, 521 U.S. at 935, dictate the location of the State Capitol, *Coyle v.*

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[36] Moreover, this Court has reinforced the division of power among the Sovereigns by insisting that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). *See also Gregory*, 501 U.S. at 460-61 (clear statement required to dictate qualifications for state officials); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (no abrogation of sovereign immunity without clear statement); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (clear statement required to impose conditions on the receipt of federal funds). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

Smith, 221 U.S. 559, 579 (1911), or regulate purely local matters. *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Lopez*, 514 U.S. at 561 n.3. *Cf. Gonzales*, 126 S. Ct. at ___ (National Attorney General may not shift "authority from the States to the Federal Government to define general standards of medical practice in every locality."). Similarly, this Court has restricted Congress' power to enforce the Fourteenth Amendment, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), and its ability to abrogate the States' sovereign immunity. *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). Indeed, in some circumstances, the States' sovereignty interest will preclude federal courts from enjoining on-going violations of federal law. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 286-87 (1997).

These constitutional principles of dual sovereignty are equally applicable when the President negotiates and the Senate ratifies a treaty. *See Reid v. Covert*, 354 U.S. 1, 17 (1957) ("It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."). *See also* Michael D. Ramsey, *The Treaty Clause* in *The Heritage Guide to the Constitution* 205, 207 (Edwin Meese III, Matthew Spalding, & David Forte, eds., 2005) ("A treaty presumably cannot alter the constitutional structure of government. . . ."). Quite simply, the National Government "is one of limited powers" and its authority cannot be "enlarged under the treaty-making power." *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836). Consequently, "the treaty power should be subject to the same federalism limitations that apply to Congress's legislative powers.

[The National Government] should not be able to use the treaty power (or executive agreement power) to create domestic law that could not be created by Congress." Curtis A. Bradley, *The Treaty Power & American Federalism*, 97 Mich. L. Rev. 390, 451 (1997) (parenthetical original). *See also id.* at 456 ("Under this approach, the treaty power would not confer any additional regulatory powers on the federal government, just the power to bind the United States on the international plane. Thus, for example, it could not be used to resurrect legislation determined by the Supreme Court to be beyond Congress's legislative powers, such as the legislation at issue in the recent *New York*, *Lopez*, *Boerne*, and *Printz* decisions."). *Cf.* Ramsey, *supra*, at 207 ("The revival of interest in federalism limits on Congress in such areas as sovereign immunity and the Tenth Amendment raises the question of whether these limits also apply to the treaty power . . . ").

Put another way, the President and the Senate cannot circumvent the limitations on the powers of the National Government simply by negotiating and ratifying a treaty. *See Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."). *See also Federal Republic of Germany*, 526 U.S. at 112 (expressing doubt that the President can prevent a State from executing a foreign national unless that foreign national is a diplomat). For example, because the States

are immune from intellectual property claims, *see Florida Prepaid Postsecondary Education Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636 (1999), no treaty could require the States to waive their sovereign immunity for intellectual property claims. *See College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 683 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin."). As noted above, no treaty could require the States to move their state capitol, *Coyle*, 221 U.S. at 579, to allow international entities to regulate purely local matters, *Morrison*, 529 U.S. at 617-19; *Lopez*, 514 U.S. at 561 n.3, to use state officials to enforce international law, *Printz*, 521 U.S. at 935, or force the States to pass specific legislation, *New York*, 505 U.S. at 162.

Missouri v. Holland, 252 U.S. 416 (1920), does not command a different result. *Holland* did not hold that the National Government could expand its powers vis-à-vis the States by entering into treaties with foreign nations. *Cf. Commonwealth v. Tasmania*, (1982) 158 C.L.R. 1 (Austl.) (National Government of Australia can expand its powers vis-à-vis the Australian States by entering into treaties.); *Canada v. Ontario*, [1937] A.C. 326, 354 (P.C.) (appeal taken from Can.) (National Government of Canada cannot expand its powers vis-à-vis the Provinces by entering into treaties.). Indeed, this Court limited its decision in *Holland* by stating that "[w]e do not mean to imply that there are no qualifications to the treaty-making power," *Holland*, 252 U.S. at 433. Rather, *Holland* simply held that there are some actions that

the National Government can take pursuant to the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, that it cannot take pursuant to the Commerce Clause, U.S. Const. art. I § 8, cl. 3.[37] In other words, the Treaty Clause confers a different (and in some cases broader) power than that conferred pursuant to the Commerce Clause. *See* Bradley, *supra,* at 426. *See also* C.M. Micou, Comment, *The Treaty Making Power and the Constitution*, 6 Cornell L.Q. 91, 95 (1921) (offering a similar interpretation of *Holland*). While this interpretation of *Holland* still results in a broad Treaty Clause power for the National Government, it also preserves the constitutional principles of dual sovereignty as a substantive limitation on the Treaty Clause. *See* Charles Cooper, *Reserved Powers of the States* in *The Heritage Guide to the Constitution* 371, 374 (Edwin Meese III, Matthew Spalding, & David Forte, eds., 2005) ("Even if modern developments permit (or require) expansion of congressional authority well beyond its eighteenth century limits, such expansion cannot extinguish the 'retained' role of the states as limited but independent sovereigns.").

b. Requiring State Courts To Ignore State Law Would Contradict the Constitutional Principles of Dual Sovereignty.

Any interpretation of the *VCCR* that requires state courts to ignore state law whenever a *VCCR* claim is raised would contradict constitutional principles of dual

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[37] Moreover, because the treaty in *Holland* was to be enforced by a *federal* game warden, there was no issue that state game wardens were improperly commandeered to implement the treaty. *Holland*, 252 U.S. at 431.

sovereignty.[38] First, requiring state courts to ignore state law would interfere with the States' sovereign powers.[39] Second, requiring state courts to ignore state law would allow the National Government to use the Treaty Clause to commandeer the state courts.

i. Requiring State Courts to Ignore State Law Would Interfere with the States' Sovereign Powers.

Any interpretation of the *VCCR* that requires state courts to ignore state law would "frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Coleman*, 501 U.S. at 748. Because the "States possess primary authority for defining and enforcing the criminal law," *Engle v.*

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[38] Similarly, any interpretation of the *VCCR* that would require state *law enforcement officials* to take affirmative steps to implement the *VCCR* raises grave constitutional questions. In our constitutional system, the National Government may not force state officials to enforce federal law. *See Printz*, 521 U.S. at 925-33 (1997). First, requiring state officials to enforce federal law offends the principles of dual sovereignty. *Id.* at 919-22. Second, requiring state officials to enforce federal law violates the principles of separation of powers because it intrudes on the President's prerogatives. *Id.* at 922-25. If state law enforcement officials cannot be compelled to enforce federal statutes, then surely they cannot be compelled to enforce federal treaties.

[39] Moreover, to the extent that such an interpretation of the *VCCR* would require that federal or state courts hear *VCCR* claims brought by a foreign nation against a State, such an interpretation would violate sovereign immunity. *See Monaco*, 292 U.S. at 329-30 (States' sovereign immunity bars suit by foreign nation.). *See also Federal Republic of Germany*, 526 U.S. at 112 (National Government's sovereign immunity bars suit by foreign nation based on the *VCCR*). If Congress may not use its Article I powers to abrogate sovereign immunity, *Seminole Tribe*, 517 U.S. at 72, then the President and the Senate cannot use the Treaty Clause to effectively abrogate sovereign immunity.

Isaac, 456 U.S. 107, 128 (1982), this Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Coleman*, 501 U.S. at 726. *See also McCleskey v. Zant*, 499 U.S. 467, 493 (1991) ("[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to State that results through reexamination of a state conviction on a ground that the state did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments."). Thus, if a state court concludes that habeas relief is barred by *state* law, then federal courts will not review that judgment. *See Wainwright*, 433 U.S. at 81. "The rule applies with equal force whether the state-law ground is substantive or procedural." *Lee v. Kemna*, 534 U.S. 362, 375 (2002). Moreover, the rule applies even where a *constitutional* claim is involved. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (claims based on *Miranda v. Arizona*, 384 U.S. 436, (1966)); *Wainwright*, 433 U.S. at 87-88 (voluntariness claims). Indeed, when a state court denies habeas relief based on state law, this Court lacks "jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory."[40] *Lambrix*, 520 U.S. at 523.

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[40] Of course, when a state prisoner files a habeas petition in a federal district court, there is a different rationale for deferring to state court's interpretation of state law. "The 'independent and adequate state ground' doctrine is not technically jurisdictional when a federal court considers a state prisoner's petition for habeas corpus pursuant to [the federal habeas corpus statute] since the federal court is not formally reviewing a judgment, but is determining whether the

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See also Sochor v. Florida, 504 U.S. 527, 533-34 (1992); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Yet, if the *VCCR* were interpreted to require state courts to ignore state law when a prisoner makes a Treaty claim, these principles would become meaningless. The sweeping aside of all "procedural defaults" as the International Court of Justice Court broadly defined them, *see Avena*, 2004 I.C.J. at ¶ 111, would constitute an unprecedented and extremely disruptive intrusion into the States' sovereignty. State courts routinely review issues rooted in federal statutory or constitutional law and do so using their own rules of adjudication. Rules of procedural default are critical to ensuring the orderly administration of justice. For example, the Virginia law procedural bar at issue here, *Slayton*, provides that as a matter of state law, a trial court might commit error by "permitting inquiry" on a question that could have been raised at trial and pursued on appeal.[41] *Slayton*, 205 S.E.2d at 682. "Because allegations of trial court error are *not cognizable* by habeas corpus, habeas cannot be used as a substitute for an

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prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." *Lambrix*, 520 U.S. at 523. In that situation, "[a]pplication of the 'independent and adequate state ground' doctrine to federal habeas review is based upon equitable considerations of federalism and comity. It 'ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.'" *Id.*

[41] There is no doubt that *Slayton* is an adequate state bar to federal habeas review. *See Wright v. Angelone*, 151 F.3d 151, 159-60 (4th Cir. 1998). *See also Smith v. Murray*, 477 U.S. 527, 533 (1986) (acknowledging Virginia's application of *Slayton* bar).

appeal." *Dodson v. Director,* 355 S.E.2d 573, 575 n.4 (Va. 1987).[42]

Under Bustillo's view, this Court would have to dictate to a state court the scope it should attribute to an extraordinary writ under state law. Moreover, when a *VCCR* issue is present, this Court and the lower federal courts could no longer respect the States' sovereign interests or state court determinations of state law. The federal issues – whether the treaty has been violated and, if so, whether the violation warrants habeas relief – would be reached even though there is an independent and adequate state law ground for denying habeas relief. Indeed, claims based on the Treaty will be treated *more favorably* than claims based on the Constitution. A constitutional claim would still be subject to state procedural default rules, *Ylst*, 501 U.S. at 801, but a *VCCR* claim would not.[43] An interpretation that subordinates the States' sovereign interests and elevates a mere treaty over the Constitution should be rejected.

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[42] Of course, *Slayton* is analogous to federal law. *See Sunal v. Large*, 332 U.S. 174, 178 (1947) ("[T]he writ of habeas corpus will not be allowed to do service for an appeal.").

[43] The opportunities for the disruption of the orderly processes of justice that would follow from this Court's adoption of the *Avena* holding are all too obvious. The eleventh hour appeals in *Breard*, 523 U.S. at 379 and *Federal Republic of Germany*, 526 U.S. at 112, demonstrate the potential for disruption. If this Court were to adopt *Avena*, *VCCR* claims could be raised in any state court, at any time, regardless of whether the petitioner pled guilty. *See Miles v. Sheriff of Virginia Beach City Jail*, 581 S.E.2d 191, 193 (Va. 2003) (voluntary plea of guilty "waives all non-jurisdictional defects that occurred prior to entry of the guilty plea."). Moreover, *VCCR* claims could be filed at any time – regardless of whether the claim was timely or could have been previously raised – whereas claims rooted in our fundamental charter of government could be defaulted. Neither the text nor the legislative history indicates that the Executive Branch or Congress intended such a perplexing and unprecedented intrusion into a core function of state government.

ii. Requiring State Courts to Ignore State Law Would Allow the National Government to Use the Treaty Clause to Commandeer the State Courts.

Any interpretation of the *VCCR* that requires state courts to ignore state law would allow the National Government to use the Treaty Clause to commandeer the States – specifically the state courts. In our system of dual sovereignty, the National Government may not direct the States to pass legislation, *New York*, 505 U.S. at 176 or use state officials to enforce federal law, *Printz*, 521 U.S. at 933. While Congress may require state courts of "adequate and appropriate" jurisdiction, *Testa v. Katt*, 330 U.S. 386, 394 (1947), "to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power," *Printz*, 521 U.S. at 907, Congress may not "pursue federal objectives through the state judiciaries," *Alden*, 527 U.S. at 753. "A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Id.* at 749. Thus, the Constitution

> recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the

> authority of the state and, to that extent, a denial of its independence.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938).

Yet, if the *VCCR* were found to require state courts to ignore state law, then the *VCCR* effectively would allow the National Government – using the Treaty Clause – to commandeer the state courts. Requiring state courts to ignore state law is essentially the same as telling a State that it must adopt a specific law or a specific set of court rules. *Cf. New York*, 505 U.S. at 176 (Congress may not direct States to pass legislation). Moreover, requiring the state judiciary to hear Treaty claims and then to issue writs of habeas corpus against the state executive branch is essentially the same as pressing state courts into federal service to coerce the State. *Alden*, 527 U.S. at 749. The constitutional prohibition on commandeering cannot be circumvented by the Treaty Clause.

"The 'dual sovereignty' of our national and state governments is a novel experiment. But like many ingenious and complex innovations, it is a fragile one." Sandra Day O'Connor, *The Majesty of the Law* 56 (paperback ed. 2004). "If there is any danger, it lies in the tyranny of small decisions – in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell." Laurence Tribe, *American Constitutional Law* 381 (2nd ed. 1988). Any interpretation of the *VCCR* requiring state courts to ignore state law contradicts the constitutional principles of dual sovereignty and thus, at a minimum, raises grave constitutional concerns.[44] Therefore, under the Doctrine of Constitutional

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[44] Moreover, where – as here – this Court is reviewing a state court decision that rests on an adequate and independent state ground, such an

(Continued on following page)

Doubt, any such interpretation should be rejected. Accordingly, Bustillo is not entitled to habeas relief.[45]

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interpretation of the *VCCR* raises grave constitutional questions concerning the limits on this Court's jurisdiction. This Court lacks jurisdiction to render advisory opinions. *See Sochor,* 504 U.S. at 533-34 and n.*. Consequently, this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman,* 501 U.S. at 729. "Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix,* 520 U.S. at 523. Yet, if the *VCCR* requires state courts to ignore state law, then this Court will be reviewing state court decisions that – but for the *VCCR* – would rest on adequate and independent state grounds.

[45] If this Court concludes that the *VCCR* does create individual rights that are judicially enforceable and that the *VCCR* requires state court to ignore state law, then Bustillo is not necessarily entitled to relief. Indeed, Bustillo can obtain relief only if he demonstrates that Virginia's failure to follow the *VCCR* had a prejudicial effect on his trial. *See Breard,* 523 U.S. at 376-77; *Arizona v. Fulimante,* 499 U.S. 279, 295-96 (1991). *Cf. Avena,* 2004 I.C.J. ¶ 120.

Bustillo was not prejudiced. First, he claims that he could have obtained a photograph of Sirena from Honduras, and this would have assisted witnesses in identifying Sirena. However, these witnesses knew both Bustillo and Sirena. It is difficult to see why they needed a photograph to make an identification. *Bustillo Br.* at 48. Moreover, these witnesses gave conflicting statements to the police and to trial counsel, who made a tactical decision not to call them.

Second, although the police had a nickname rather than a full name, it was uncontested at trial that "Sirena" was a real person, that he was at the crime scene, and that he could not be found shortly after the attack. Furthermore, under the facts of the case, Sirena would have been liable under Virginia law as a principal in the second degree. *See Moehring v. Virginia,* 290 S.E.2d 891, 892 (Va. 1982) ("A principal in the second degree is one who is not only present at a crime's commission, but one who also commits some overt act, such as inciting, encouraging, advising, or assisting in the commission of the crime or shares the perpetrator's criminal intent."). "[A] principal in the second degree may be indicted, tried, convicted, and punished in all respects as if a principal in the first degree." *Taylor v. Virginia,* 537 S.E.2d 592, 594 (Va. 2000). Therefore, Sirena's flight is hardly surprising.

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CONCLUSION

The judgment of the Supreme Court of Virginia should be **AFFIRMED**.

Respectfully submitted,

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Third, Bustillo also claims that the Honduran government might have questioned Sirena. *Bustillo Br.* at 49. This assertion is pure speculation. Bustillo has offered no evidence obtained from Sirena by the Honduran police. As to Sirena's purported confession, obtained by a gang member from a gang member, for the benefit of an incarcerated gang member, it is inadmissible as unreliable hearsay. In cases such as *Chambers v. Mississippi*, 410 U.S. 284, 287-89 (1973) and *Hines v. Virginia*, 117 S.E. 843, 845 (Va. 1923), the third party confessions were all attended by circumstances that strongly suggested the reliability of the confession: the confession was made repeatedly to neutral witnesses who were available to testify. Not only is Sirena's purported confession devoid of any such indicia of reliability, but in addition the record in this case is rife with evidence of witness manipulation and intimidation by Bustillo's father or members of his gang. Tr. 3/18/98 at 149-50; Tr. 7/31/98 at 180-82; Tr. 12/5/02 at 85.

However, because Virginia law barred both the trial court and the Supreme Court of Virginia from considering his *VCCR* claim, there has been no judicial assessment as to whether Bustillo was prejudiced. Thus, if Bustillo prevails on *both* questions, the proper response from this Court is to remand the matter for further proceedings.

No. 05-51

MAR 7 - 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
OF THE VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

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I. Article 36 Creates Enforceable, Individual Rights

No one disputes that, when determining whether Article 36 creates individual rights, "[t]he clear import of treaty language controls." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982). Here, the treaty's text is unequivocal. Article 36 provides that "authorities [of the receiving State] *shall* inform [the detainee] of *his rights* under [Article 36(1)]." Vienna Conv. art. 36(1)(b) (emphasis added). And it declares that a receiving State's laws "must enable full effect to be given to the purposes for which the *rights* accorded under this Article are intended." *Id.* art. 36(2) (emphasis added). The Commonwealth thus concedes (Br. 14) that "Article 36 * * * discusses a 'right' of access to consular officials," and the United States acknowledges (Br. 16) that Article 36 "refers to the detainee's 'rights.'" That language is reinforced by Article 36's drafting history; by the United States' repeatedly expressed (but now conveniently ignored) view that Article 36 creates individual rights; and by the considered and persuasive views of other signatories and the international tribunal entrusted with the Convention's construction.

A. There Is No Presumption Against The Recognition Of Individual Rights Under Treaties

1. Hoping to minimize the import of the treaty's text, its *travaux préparatoires*, and the signatories' post-ratification conduct, the Commonwealth and the United States insist there is a "long-established presumption" against the recognition and judicial enforcement of individual treaty rights. U.S. Br. 11; see Resp. Br. 12-13. Respondent thus declares (Br. 12-13) that any "ambiguity in the treaty * * * is resolved by the customary presumption against the creation of treaty-based individual rights." Even if such a presumption exists—and, as explained below, it does not—a presumption cannot make the treaty's reference to "rights" mean something else, nor can it overcome other indicia of the treaty's meaning. In any event, this Court's cases refute respondent's proposed presumption: The "long-established" rule is that, "'where * * * a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more

liberal interpretation is to be preferred.'" *United States* v. *Stuart*, 489 U.S. 353, 368 (1989) (quoting *Bacardi Corp. of Am.* v. *Domenech*, 311 U.S. 150, 163 (1940)).

The *Head Money Cases*, 112 U.S. 580 (1884), are not to the contrary. Those cases do state that "'[a] treaty is primarily a compact between independent nations,'" and they note that treaty violations may become the "'subject of international negotiations and reclamations.'" Resp. Br. 12, 24; U.S. Br. 11. But those cases establish no *interpretive* presumption against private rights. To the contrary, they recognize:

> [W]henever [a treaty's] provisions prescribe a rule by which the rights of the private citizen or subject may be determined[, and] when such rights are of a nature to be enforced in a court of justice, [the] court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Head Money Cases, 112 U.S. at 598-599.

The Restatement (Third) of Foreign Relations Law (1987) provides even less support for the proposed presumption. It does observe that "'[i]nternational agreements * * * generally do not create private rights.'" Resp. Br. 11; U.S. Br. 12 (quoting 2 Restatement § 907, cmt. a, at 395). But that does not create a presumption. In fact, the commentary continues: "Whether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement." 2 Restatement § 907, cmt. a, at 395. Respondent and the United States, moreover, elevate the commentary over § 907's *text*, which says that "[a] private person having rights against the United States under an international agreement may assert those rights in courts in the United States." *Id.* § 907(1), at 395.[1]

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[1] Nor do other decisions of this Court (see U.S. Br. 11) support a presumption. *Charlton* v. *Kelly*, 229 U.S. 447, 450, 475-476 (1913), addressed the scope of federal "habeas corpus," not treaty rights; *Whitney* v. *Robertson*, 124 U.S. 190, 193-194 (1888), held that a subsequent federal statute superseded an earlier treaty; and *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 307 (1829), held that the Court would not resolve a dispute "between two nations

2. In their haste to assemble a presumption, the Commonwealth and its *amici* also conflate two analytically distinct issues. The question here is whether the treaty creates an individual right for detained foreign nationals, not, as they suggest (Resp. Br. 15; U.S. Br. 12), whether it creates a private *cause of action*. In this case, the cause of action—the mechanism by which Bustillo asserts the violation of his rights in court—is provided by Virginia's habeas corpus statute, Va. Code Ann. § 8.01-654. That statute allows suit by those claiming to be "detained without lawful authority," including any challenge to a "conviction or sentence." Petitioner in No. 04-10566, Moises Sanchez-Llamas, need not show that he has a cause of action; he asserts his rights defensively in a criminal prosecution brought by the State. In both cases, petitioners do not claim that the Vienna Convention creates a cause of action. They claim merely that the treaty supplies "a rule of decision for * * * case[s]" that are otherwise properly before the courts. *Head Money Cases*, 112 U.S. at 599.

Respondent thus errs in suggesting (Br. 15) that relief is unavailable unless Article 36 "creates a judicially cognizable cause of action." Prisoners seeking federal habeas relief based on a constitutional violation do not need to prove that the Constitution creates a "private right of action." The federal habeas statutes, 28 U.S.C. §§ 2254 & 2255, supply the cause of action. Nor do plaintiffs suing under 42 U.S.C. § 1983 need to show that the violated statute or the Constitution creates a private cause of action. Section 1983 provides that. See *Gonzaga* v. *Doe*, 536 U.S. 273, 284 (2002). ("[Section 1983 plaintiffs] do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights * * * ."). Likewise here, Bustillo need not

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concerning a national boundary" under a treaty that was not self-executing, *id.* at 314-315. The proffered lower-court cases, Resp. Br. 12-13 & n.13; U.S. Br. 11-12, are also unpersuasive. The supposed presumption in those cases originates in *Goldstar (Panama) S.A.* v. *United States*, 967 F.2d 965 (4th Cir. 1992). But *Goldstar* did not hold that there is a presumption *against* recognizing and enforcing individual treaty rights. It observed only that there was no presumption *in favor* of individual rights. *Id.* at 968.

show that the treaty creates a cause of action or provides for a "domestic judicial remedy." Resp. Br. 21. The Virginia habeas statute does that.

For the same reason, the United States' reliance on *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), is misplaced. While the United States claims that *Amerada Hess* "held that two conventions did not create judicially enforceable rights for ship owners," Br. 12; see Resp. Br. 16, that description is incomplete. The issue was not whether the treaties at issue created *individual rights* (or whether the nature of the rights rendered them incapable of enforcement). It was whether the treaties created *causes of action* for foreign corporations. Because the corporations could not assert treaty violations under causes of action created by other statutes (such as habeas or § 1983), they were forced to argue that the treaty itself created a federal cause of action for damages. 488 U.S. at 442. Relying on sovereign immunity principles, this Court held that the treaties "'do not create *private rights of action* for foreign corporations to recover compensation from foreign states in United States courts.'" U.S. Br. 12 (quoting 488 U.S. at 443) (emphasis added). That holding has no bearing where, as here, a statute (the Virginia habeas statute) creates the cause of action being invoked.[2]

The United States likewise errs in citing *Johnson* v. *Eisentrager*, 339 U.S. 769 (1950), for the proposition that the "protections of the [Geneva Convention] are not judicially enforceable." U.S. Br. 12. In that case, this Court did not hold that the *rights* being asserted were, by their nature, incapable of judicial enforcement. The Court held that, regardless of the right at issue, the writ of habeas corpus—the *cause of action* through which German prisoners sought to assert putative treaty rights—was not available to "an enemy alien who, at no

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[2] The United States' and respondent's attempt to distinguish individual rights from "judicially enforceable individual rights," U.S. Br. 11; see *id.* at 17; Resp. Br. 19, reflects the same confusion. If the treaty gives the individual a right, that right can be asserted as a rule of decision in any matter otherwise properly before the court.

relevant time and in no stage of his captivity, has been within [the United States'] territorial jurisdiction." 339 U.S. at 768. This Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), confirms that reading of *Eisentrager*. See 542 U.S. at 478-479 & n.8; *id.* at 493 (Scalia, J., dissenting). Here, there is no doubt that the Virginia habeas statute extends to prisoners held by Virginia in the Commonwealth itself.

The controlling principles here come from *United States* v. *Jung Ah Lung*, 124 U.S. 621, 632-633 (1888), which respondent and its *amici* simply ignore. In that case, the treaty did not provide a private "right of action" to sue in federal court. In fact, "the treaty itself contemplate[d] only executive action." *Id.* at 632. But that did not stop this Court from enforcing the treaty rights through the writ of habeas corpus. *Id.* at 627-628. Likewise, so long as the Vienna Convention creates individual rights, the Virginia habeas statute provides Bustillo with a cause of action to assert their violation.[3]

3. Ultimately, the United States is reduced to arguing that, although this Court has consistently enforced treaty rights, see, *e.g.*, Pet. Br. 18-19 & n.3, such enforcement is limited to treaties that "guarantee * * * freedom to exercise such peculiarly private rights as the ability to enter into contracts, engage in commerce, or own, devise, or inherit property."

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[3] Respondent now asserts (Br. 25-27) that, just as some *statutory* violations do not warrant *federal* habeas relief, some *treaty* claims do not warrant *state* habeas relief. But the Commonwealth never raised that issue below or in its brief in opposition; accordingly, it is waived. *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-816 (1985). In any event, the limit respondent cites is derived from *federal* habeas principles and has been applied only to federal habeas petitions, as respondent concedes. Br. 26 n.24; *Reed* v. *Farley*, 512 U.S. 339, 349-355 (1994). Respondent makes no effort to explain why that federal standard should govern state habeas cases. The rule is also limited to "technical error[s]" where the petitioner "suffered no prejudice." 512 U.S. at 352, 355. It does not apply where, as here, the violation likely resulted in the conviction of an innocent man. Pet. Br. 45-50; n.13, *infra*. Respondent's invocation of *Teague* v. *Lane*, 489 U.S. 288 (1989), is similarly flawed. As we explained at the petition stage, respondent waived *Teague* by failing to raise it below, and *Teague* does not apply to state habeas claims in any event. Pet. Cert. Reply at 3-7. Respondent does not even hazard a response.